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GENERAL COUNSEL
OF COPYRIGHT

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In re:	)	
Mechanical and Digital Phonorecord	)	No. 96-4
Delivery Rate Adjustment Proceeding	)	CARP DPRA
	)	

RESPONSE OF THE COALITION OF INTERNET WEBCASTERS TO THE BMI MOTION AND THE NMPA, SGA AND RIAA JOINT REPLY COMMENTS

The Coalition of Internet Webcasters ("the Coalition"), hereby responds to the Motion to File Late a Notice of Intent to Participate filed by Broadcast Music Inc. ("BMI") on January 16, 1998 (hereinafter "BMI Motion"),[1] and the Joint Reply Comments filed January 23, 1998 by the National Music Publishers Association ("NMPA"), Songwriters Guild of America ("SGA") and the Recording Industry Association of America ("RIAA") (hereinafter "Joint Reply Comments").[2] At the center of the BMI Motion and the Joint Reply Comments are four flawed premises, which are addressed briefly below.

First, the proposed regulations do more than "merely track" the statutory language of the Digital Performance Right in Sound Recordings Act ("DPRA"). The proposed regulations construct a new category of phonorecord, the "Transient Phonorecord," as a species of "Incidental Digital Phonorecord Delivery." The breadth of that new species effectively distorts and expands the scope of the genus of "digital phonorecord delivery" ("DPD"), by reading out of Section 115(d) the requirement that a DPD result in a "*specifically identifiable reproduction.*" As a result, the proposed regulations suggest that a determination already has been made that certain types of transmissions constitute DPDs (including Incidental DPDs and Transient Phonorecords) when the statutory language would leave open that determination based on the particular facts and circumstances. Indeed, as set forth in the Coalition's Objections filed December 29,

[1] The Coalition takes no position as to whether the BMI Motion should be granted. For the reasons described below, the Coalition does not concur with BMI's view that the issues being raised by the Coalition or the U.S. Telephone Association are "legal issues and are outside the scope of this proceeding." BMI Motion at 2.

[2] The Coalition notes that the Copyright Office December 1, 1997, Federal Register Notice with respect to this proceeding does not provide specifically either for reply comments or further reply comments thereto. On the assumption that the Copyright Office will accept the late filing of the BMI Motion and consider the Joint Reply Comments, the Coalition responds to their arguments herein.

1997, the statutory language clearly demonstrates that streaming audio is not subject to the mechanical license generally or as a DPD specifically. Although the additional language proposed in the Joint Reply Comments is helpful, it does not resolve the objections raised by the Coalition to the proposed regulations.

Moreover, the proposed regulations purport to establish the elements for imposing secondary liability against entities that transmit Transient Phonorecords (and, by implication, all Incidental DPDs). This new standard for secondary liability is not set forth in the DPRA or the Copyright Act, and the standards under which such liability may be imposed have been the subject of litigation and ongoing legislative debate. The Coalition objects to the use of this proceeding to establish by regulation the standards of liability for Internet Service Providers or Online Service Providers for the infringing acts of others, and thus objects to proposed § 255.6(b).

Second, the Joint Reply Comments argue that the parties are better off with a compulsory license than with liability for reproduction or distribution of an Incidental DPD. It is true that the DPRA was intended to afford a compulsory license under section 115 with respect to all acts that would otherwise constitute unauthorized and infringing reproductions of the musical work in an electronic environment. However, the compulsory license only is necessary if such acts otherwise would constitute infringement of the reproduction or distribution right. The proposed regulations purport to decide that all acts that occur in the course of transmission require a compulsory mechanical license. The Coalition believes that such issues should not be prejudged by regulation. It is a matter for the courts, not these regulations, to determine, for example, whether technologies that merely facilitate performance require a mechanical license, or whether the use of these technologies otherwise is immunized from liability under existing limitations and exceptions under copyright law, such as fair use.

Third, it is difficult for the proponents of these regulations to contend that this proceeding solely may "determine royalty rates under the mechanical compulsory license" and that the Copyright Office or a CARP may not determine whether particular technologies (such as streaming media) do not result in a DPD or an incidental DPD. If such matters are outside the scope of a CARP proceeding, then proposed § 255.6(a) also must be stricken, since a linchpin of that paragraph is the proposal that "In any future proceeding under 17 U.S. 115(c)(3)(C) or (D), the characterization of a digital phonorecord delivery as 'incidental' and the royalty rates payable for a compulsory license for Incidental DPDs shall be established de novo, ..." If the Copyright Office or a Copyright Arbitration Royalty Panel ("CARP") can determine such issues "in any future proceeding," they obviously have the authority to do so here and now.

Fourth, the proponents of the regulation incorrectly state that only these "legal" issues have been raised by the Coalition's Objections. If streaming media are found by the Copyright Office to be outside the scope of the mechanical license and the definition of DPDs, then the Coalition observed that they would have no specific reason to challenge the proposed regulations. If, however, the proponents are correct and streaming media technologies might be subject to the proposed regulations, then the

Coalition Objections raised issues that would be required to be addressed in an arbitration proceeding, including but not limited to:

- The request for an exemption from royalty payments for performances via streaming media (assuming such technologies may be found to create Incidental DPDs or Transient Phonorecords);

- Opposition to applying the full statutory rate to any and all types of Incidental DPDs. It would be absurd to apply the same rate charged for recording a song on a permanent compact disc that can be replayed over and over again, to any technology designed to facilitate performance rather than permanent recording, including ephemeral technologies such as streaming media;

- Objection to limiting the definition of "Transient Phonorecords" to copying that occurs solely to facilitate intermediate transmission, rather than to facilitate transmission of the performance to the user; and,

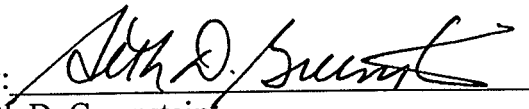
- Opposition to restricting the §255.6(c) exemption to clips of 30 seconds or less, and to uses that are "incidental to the promotion" of the sound recording or work.

These and other objections raised by the Coalition to the draft regulations also would be properly resolved by a CARP, in the absence of voluntary agreement among the affected parties.

WHEREFORE, the Coalition of Internet Webcasters objects to the proposed regulations, and the terms and rates set forth in the December 1, 1997, Notice of Proposed Rulemaking, and intends to participate in any proceeding convened concerning these proposed regulations before a Copyright Arbitration Royalty Panel.

Respectfully submitted,

COALITION OF INTERNET WEBCASTERS

By: 

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